

NO. PD-711-17

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
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DEANA WILLIAMSON, CLERK

MARIAN FRASER

v.

THE STATE OF TEXAS

From the Amarillo Court of Appeals
Cause No. 07-15-00267-CR

RESPONDENT MARIAN FRASER'S BRIEF

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ORAL ARGUMENT REQUESTED

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WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW (2d ed. 1986)4

Response to Issue Presented

1. Reckless or criminally negligent injury to a child or child endangerment cannot be used as the underlying felony for a felony-murder prosecution alleging murder by injury to a child or by child endangerment.

Summary of the Argument

The State contends that injury to a child and child endangerment can never be lesser-included offenses of manslaughter because the statutory elements for those offenses include specific age requirements while the statutory elements for manslaughter do not include an age requirement. This argument ignores this Court's established test for determining whether an offense is a lesser-included offense that looks to not only the statutory elements but also the allegations of the indictment—including the facts alleged, descriptive averments, and elements that “may be deduced” from the descriptive averments under the functional-equivalence concept. Here, the indictment alleges that Fraser committed or attempted to commit the offense of injury to a child or child endangerment. Under functional equivalence, it can be deduced from these allegations that the State had to prove the victim was 14 or younger. Therefore, reckless and criminally negligent homicide are lesser-included offenses of manslaughter under the indictment.

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Argument

1. **Reckless or criminally negligent injury to a child or child endangerment cannot serve as the underlying felony for a felony-murder prosecution premised on one of those felonies.**

The indictment alleges that Marian Fraser committed the offense of felony murder by committing an act clearly dangerous to human life that caused the death of C.F. in the course of committing or attempting to commit the offense of injury to a child or child endangerment. By alleging that Fraser committed or attempted to commit injury to a child or child endangerment, the State had to prove that her victim was 14 or younger. Under the functional-equivalence concept adopted by this Court, reckless and criminally negligent injury to a child and child endangerment are lesser-included offenses of manslaughter under this indictment. Therefore, they cannot serve as the underlying felonies for a felony-murder prosecution.

- A. **Reckless and criminally negligent injury to a child and child endangerment are lesser-included offenses of manslaughter under the indictment.**

Under the felony-murder statute, manslaughter and lesser-included offenses of manslaughter cannot serve as the felony on which prosecution is based. Reckless and criminally negligent injury to a child and child

endangerment are lesser-included offenses under Fraser's indictment when the Court applies the functional-equivalence concept adopted in *Hall* and *Watson*. The Amarillo Court thus rightly held that Fraser's jury charge was erroneous to the extent it permitted a felony-murder conviction premised on reckless or criminally negligent injury to a child or child endangerment.

1. A felony-murder prosecution cannot be premised on manslaughter or a lesser-included offense of manslaughter.

Section 19.02(b)(3) of the Penal Code defines the offense of felony murder as the commission or attempted commission of "a felony, other than manslaughter" during which the actor commits "an act clearly dangerous to human life that causes the death of an individual." TEX. PEN. CODE § 19.02(b)(3).

Because the statute on its face excludes manslaughter as an underlying felony, this Court has held that "a conviction for felony murder under section 19.02(b)(3), will not lie when the underlying felony is manslaughter or a lesser included offense of manslaughter." *Lawson v. State*, 64 S.W.3d 396, 397 (Tex. Crim. App. 2001) (quoting *Johnson v. State*, 4 S.W.3d 254, 258 (Tex. Crim. App. 1999)).

Former Judge Cochran explained this prohibition on reckless homicides being included in the felony-murder statute.

[T]he offense of manslaughter is never felony murder, for obvious reasons. Involuntary manslaughter is, by definition, an accidental homicide, committed with recklessness. If involuntary manslaughter could form the basis of a felony murder prosecution, each and every such recklessly caused death would constitute felony murder. The offense of involuntary manslaughter would be swallowed up by the felony murder rule.

Lawson, 64 S.W.3d at 398 (Cochran, J., concurring) (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 7.5(g) (2d ed. 1986) (if felony-murder applied to reckless homicides, “manslaughter has ceased to exist as a separate crime; all manslaughters ride up an escalator to become felony-murders”).

Here, the State is asking this Court to endorse placing reckless and criminally negligent injury to a child and child endangerment on the felony-murder escalator even though, under the indictment, they are lesser-included offenses of manslaughter.

2. The Court uses the cognate-pleadings test to determine whether an offense is a lesser-included offense under article 37.09(1).

Article 37.09 of the Code of Criminal Procedure furnishes the statutory definition for a lesser-included offense. Subdivision (1) provides

that an offense is a lesser-included offense if “it is established by proof of the same or less than all the facts required to establish the commission of the offense charged.” TEX. CODE CRIM. PROC. art. 37.09(1).¹

The Court uses a two-step analysis to determine whether a defendant is entitled to a jury instruction for a lesser-included-offense, asking: “(1) Is the requested charge for a lesser-included offense of the charged offense? (2) Is there trial evidence that supports giving the instruction to the jury?” *Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011) (citing *Hall v. State*, 225 S.W.3d 524, 535-36 (Tex. Crim. App. 2007)). The question presented in this appeal concerns only the first step of this analysis.

In *Hall*, the Court adopted the cognate-pleadings test for the first step of the lesser-included offense analysis under article 37.09(1). *McKithan v.*

¹ An offense may also be a lesser included offense if:

- “it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;”
- “it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or”
- “it consists of an attempt to commit the offense charged or an otherwise included offense.”

TEX. CODE CRIM. PROC. art. 37.09(2)-(4). Although the State discusses each of these subdivisions, only subdivision (1) is at issue here.

State, 324 S.W.3d 582, 587 (Tex. Crim. App. 2010) (citing *Hall*, 225 S.W.3d at 535). The Court explained in *Hall* that this test is performed “by comparing the elements of the offense as they are alleged in the indictment or information with the elements of the potential lesser-included offense.” *Hall*, 225 S.W.3d at 535-36. But to satisfy due process concerns, the Court also observed that “the elements of the lesser offense do not have to be pleaded if they can be deduced from the facts alleged in the indictment.” *Id.* at 535.

Two years later, the Court elaborated on the cognate-pleadings test.

[I]f the indictment for the greater-inclusive offense either: 1) alleges all of the elements of the lesser-included offense, or 2) alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced. Both statutory elements and any descriptive averments alleged in the indictment for the greater inclusive offense should be compared to the statutory elements of the lesser offense. If a descriptive averment in the indictment for the greater offense is identical to an element of the lesser offense, or if an element of the lesser offense may be deduced from a descriptive averment in the indictment for the greater-inclusive offense, this should be factored into the lesser-included-offense analysis in asking whether all of the elements of the lesser offense are contained within the allegations of the greater offense.

Ex parte Watson, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009) (per curiam) (op. on reh'g) (footnotes omitted).

The Court has since described the second part of the cognate-pleadings analysis as the “functional-equivalence concept.” *McKithan*, 324 S.W.3d at 587-88. “The ‘functional-equivalence concept’ requires courts to ‘examine the elements of the lesser offense and decide whether they are functionally the same or less than those required to prove the charged offense.’” *Id.* (quoting *Farrakhan v. State*, 247 S.W.3d 720, 722–23 (Tex. Crim. App. 2008)).

The Court employed the functional-equivalence concept in *Salazar* to conclude that criminal trespass is a lesser-included offense of burglary of a habitation because, even though the indictment did not directly reference the notice element² of criminal trespass, the allegation of a habitation “was functionally equivalent to the allegation of notice that entry into the habitation was forbidden.” *Rice*, 333 S.W.3d at 146 (citing *Salazar v. State*, 284 S.W.3d 874, 876-78 (Tex. Crim. App. 2009)). As the Court observed in *Salazar*, “We believe it can be deduced from the indictment that the

² The criminal trespass statute requires proof that the defendant entered a building without effective consent and “had notice that the entry was forbidden.” TEX. PEN. CODE § 30.05(a)(1).

appellant had notice, quite simply, because notice is inherent to a habitation and the indictment read ‘burglary of a habitation.’” *Salazar*, 284 S.W.3d at 878; *accord Goad v. State*, 345 S.W.3d 443, 446 (Tex. Crim. App. 2011). *But cf. State v. Meru*, 414 S.W.3d 159, 163-64 (Tex. Crim. App. 2013) (because of different statutory definitions for “entry,” criminal trespass is not lesser-included offense of burglary of habitation unless indictment alleges “full-body entry”).

Fraser readily acknowledges that the statutory elements for injury to a child and child endangerment each include an element that manslaughter does not, namely, an age requirement for the victim of the offense. But when the Court applies the functional-equivalence concept to the allegations of the indictment, the Court must conclude that injury to a child and child endangerment are lesser-included offenses.

3. Reckless and criminally negligent injury to a child are lesser-included offenses of manslaughter under this indictment.

Count I, Paragraph I of the indictment alleges that Fraser:

did then and there commit or attempt to commit an act clearly dangerous to human life, namely, by administering diphenhydramine to [C.F.] and/or causing [C.F.] to ingest diphenhydramine, which caused the death of [C.F.], and the said Defendant was then and there in the course of or attempted commission of a felony, to-wit: Injury to a Child.

(CR6)

The Court's analysis in *Salazar* controls. "[I]t can be deduced from the indictment that the [State had to prove that C.F. was a child 14 or younger], quite simply, because [injury to a child requires proof that the child was that age] and the indictment read '[injury to a child].'" See *Salazar*, 284 S.W.3d at 878.

Injury to a child requires proof that the victim was "a person 14 years of age or younger." TEX. PEN. CODE § 22.04(c)(1). Under the indictment, the State had to prove that Fraser was committing injury to a child or attempting to commit that offense when she committed the act clearly dangerous to human life. Because of this allegation, the State had to prove that Fraser was injuring a person 14 or younger or attempting to do so.

Although the analysis is limited to the allegations of the indictment (and deductions therefrom) and the statutory elements, the jury charge serves to confirm that the State had to prove this. The trial court instructed the jurors that injury to a child requires proof that the victim was "fourteen years old or younger." (CR96) And in the application paragraph for Count I, Paragraph I, the court instructed the jurors that they must find beyond a

reasonable doubt that Fraser “was then and there in the course of or attempted commission of a felony, to-wit: Injury to a Child.” (CR98)

This is consistent with the decisions of Texas appellate courts that injury to a child is a lesser-included offense of capital murder when the victim is alleged to be a child.³ *Paz v. State*, 44 S.W.3d 98, 101 (Tex. App.—Houston [14th Dist.] 2001, pet. ref’d); *In re L.M.*, 993 S.W.2d 276, 283 & n.8 (Tex. App.—Austin 1999, pet. denied); *see also Lucio v. State*, 351 S.W.3d 878, 896 n.19 (Tex. Crim. App. 2011) (holding that *L.M.* “is arguably correct”); *Hudson v. State*, 415 S.W.3d 891, 896 (Tex. App.—Texarkana 2013) (holding that felony murder based on injury to child is lesser-included of capital murder of child), *aff’d*, 449 S.W.3d 495 S.W.3d (Tex. Crim. App. 2014).

Although it is true that these indictments generally allege that the child was younger than 6, the principle is still the same. In these capital murder cases, the indictment expressly alleged the age of the child, and the statutory elements likewise specified an age requirement. By comparison, the indictment in Fraser’s case alleges the commission or attempted

³ See TEX. PEN. CODE § 19.03(a)(8).

commission of injury to a child, and the statutory elements for injury to a child (by virtue of functional equivalence) specify an age requirement.

This Court has indeed stated that “injury to a child is not a lesser included offense of manslaughter.” *Johnson*, 4 S.W.3d at 258. And under the indictment in that case, it was not. But the only issue before the Court was whether the merger doctrine required that the State prove a separate “clearly dangerous” act other than the act that caused the injury to the child. *See id.* at 254. The Court reviewed a confusing and somewhat contradictory series of decisions addressing the felony-murder statute, particularly those following the *Garrett* decision.⁴ *Id.* at 255-57. After doing so, the Court synthesized these decisions to conclude that there is no general merger doctrine applicable to the felony-murder statute.

We hold *Garrett* did not create a general “merger doctrine” in Texas. The doctrine exists only to the extent consistent with section 19.02(b)(3). Thus, *Garrett* hereinafter stands only for the proposition that a conviction for felony murder under section 19.02(b)(3), will not lie when the underlying felony is manslaughter or a lesser included offense of manslaughter.

⁴ The defendant in *Garrett* was charged with committing a felony murder in the course of committing an aggravated assault. *Garrett v. State*, 573 S.W.2d 543, 544 (Tex. Crim. App. [Panel Op.] 1978). The Court reversed the conviction holding that “[t]here must be a showing of felonious criminal conduct other than the assault causing the homicide.” *Id.* at 546.

Id. at 258.

Then the Court concluded that injury to a child was not a lesser-included offense of manslaughter under the facts of that case. *Id.* But the Amarillo Court examined the record in that case and determined that the defendant had been charged only with intentional injury of a child. *See Fraser v. State*, 523 S.W.3d 320, 332 (Tex. App.—Amarillo 2017, pet. granted). And, consistent with Fraser’s position here, intentional injury to a child cannot be a lesser-included offense of manslaughter. But this Court did not consider recklessness or criminal negligence in *Johnson*.

The State also observes that this Court held in *Contreras* that “the offense of ‘injury to a child’ can qualify as an underlying felony in a felony murder prosecution.” *See Contreras*, 312 S.W.3d at 584. Again, Fraser does not disagree that it “can”—when committed intentionally or knowingly. And although the charge in that case addressed all four culpable mental states, the appellant contended that the jury charge violated his right to a unanimous verdict—a different issue than presented here. *Contreras*, 312 S.W.3d at 583.

For these reasons, *Johnson* and *Contreras* are not dispositive.

4. Reckless and criminally negligent child endangerment are lesser-included offenses of manslaughter under this indictment.

Count I, Paragraph II of the indictment alleges that Fraser:

did then and there commit or attempt to commit an act clearly dangerous to human life, namely, by administering diphenhydramine to [C.F.] and/or causing [C.F.] to ingest diphenhydramine, which caused the death of [C.F.], and the said Defendant was then and there in the course of or attempted commission of a felony, to-wit: Endangering a Child.

(CR6)

The Court's analysis in *Salazar* controls. "[I]t can be deduced from the indictment that the [State had to prove that C.F. was a child younger than 15], quite simply, because [child endangerment requires proof that the child was that age] and the indictment read '[endangering a child].'" See *Salazar*, 284 S.W.3d at 878.

Child endangerment requires proof that the victim was "younger than 15." TEX. PEN. CODE § 22.041(c).⁵ Under the indictment, the State had to prove that Fraser was committing child endangerment or attempting to commit that offense when she committed the act clearly dangerous to

⁵ The age requirement for injury to a child is the same, though stated differently. Cf. TEX. PEN. CODE § 22.04(c)(1) ("14 years of age or younger").

human life. Because of this allegation, the State had to prove that Fraser was endangering a person 14 or younger or attempting to do so.

Although the analysis is limited to the allegations of the indictment (and deductions therefrom) and the statutory elements, the jury charge serves to confirm that the State had to prove this. The trial court instructed the jurors that child endangerment requires proof that the victim was “younger than fifteen.” (CR96) And in the application paragraph for Count I, Paragraph II, the court instructed the jurors that they must find beyond a reasonable doubt that Fraser “was then and there in the course of or attempted commission of a felony, to-wit: Endangering a Child.” (CR98-99)

As stated before, this is also consistent with appellate decisions that injury to a child is a lesser-included offense of capital murder of a child. *See Paz*, 44 S.W.3d at 101; *L.M.*, 993 S.W.2d at 283 & n.8; *see also Lucio*, 351 S.W.3d at 896 n.19; *Hudson*, 415 S.W.3d at 896.

5. This Court has previously parsed criminal statutes based on the culpable mental states at issue and should do so here.

In *Lawson*, this Court addressed whether aggravated assault can be a lesser-included offense of manslaughter and thus precluded from serving

as the underlying felony in a felony-murder prosecution. The Court issued a very brief decision focused on the culpable mental states at issue.

Like injury to a child and child endangerment, aggravated assault may be committed intentionally, knowingly or recklessly. *See* TEX. PEN. CODE § 22.01(a)(1), 22.02(a). Reckless aggravated assault is a lesser-included offense of manslaughter.⁶ *See Cardenas v. State*, 30 S.W.3d 384, 392 (Tex. Crim. App. 2000) (listing manslaughter, criminally negligent homicide and aggravated assault sequentially as lesser-included offenses of murder); *see also Hayward v. State*, 158 S.W.3d 476, 479 (Tex. Crim. App. 2005) (assault can be lesser-included offense of murder). But as the Court noted in *Lawson*, “the issue here is whether an ‘intentional and knowing’ aggravated assault is a lesser included offense of manslaughter.” *Lawson*, 64 S.W.3d at 397. And the obvious answer was “no” because of the particular culpable mental states at issue. *Id.*; *see Neff v. State*, 629 S.W.2d 759, 760 (Tex. Crim. App. 1982) (“it is impossible for [knowing and

⁶ Reckless aggravated assault is statutorily includable as a lesser-included offense of manslaughter under the first part of the lesser-included analysis. It would admittedly be rare for the evidence to support submission of a jury instruction on this lesser offense, however, because of the victim’s death. *See Jackson v. State*, 992 S.W.2d 469, 475 (Tex. Crim. App. 1999) (“A murder defendant is not entitled to an instruction on the lesser included offense of aggravated assault when the evidence showed him, at the least, to be guilty of a homicide.”).

intentional] aggravated assault as submitted in the first trial to be a lesser included offense to involuntary manslaughter”).

Fraser is likewise asking the Court here to parse sections 22.04 and 22.041 by their culpable mental states. She agrees that the intentional or knowing commission of these offenses would not be lesser-included offenses of manslaughter. But she insists that the reckless or criminally negligent commission of these offenses would be.

At bottom, Fraser is asking the Court to hold that reckless and criminally negligent injury to a child and child endangerment cannot serve as the basis for a felony-murder prosecution. If these offenses can form the basis of a felony murder prosecution when committed recklessly or criminally negligently, “each and every such recklessly caused death would constitute felony murder. The offense[s] of [reckless and criminally negligent injury to a child and child endangerment] would be swallowed up by the felony murder rule.” *See Lawson*, 64 S.W.3d at 398 (Cochran, J., concurring).

The jury charge authorized conviction for felony murder if the jury found that Fraser committed these offenses recklessly or with criminal negligence. This was error because reckless and criminally negligent injury

to a child and child endangerment are lesser-included offenses of manslaughter for the reasons stated.

6. Fraser suffered egregious harm from the errors in the charge that permitted conviction for reckless or criminally negligent conduct.

During voir dire and closing argument, the trial court and the State informed the jury that they could return a guilty verdict even if they found that Fraser acted recklessly. The State also informed the jurors during voir dire that a finding of criminal negligence would support a conviction.

After venire panelists expressed confusion about the concept of felony murder, the trial court explained the felony-murder law for this case to the venire.

The State has alleged in this case that the defendant injured the child -- either intentionally or knowingly or recklessly injured the child or intentionally or knowingly or recklessly endangered the child. And if they prove that, either one of those, and it resulted in the death of a child, that is felony murder, and you would be required to find the defendant guilty of murder.

(3RR69)

The prosecutor then continued by explaining to the panel how the underlying felonies have four culpable mental states. (3RR70-71) She then offered a lengthy explanation of the definitions for these mental states.

(3RR71-78) She told the venire that the State had to only prove the elements for the underlying felonies as she had described them. (3RR80)

Later in discussing punishment, when a question about “accidents” was raised, the prosecutor reiterated that the jury would have to find one of the four culpable mental states to return a conviction. (3RR99-100) She discussed with various venire members whether they could consider the maximum punishment if they believed the offense was committed recklessly or with criminal negligence. (3RR100-06)

At the heart of this complaint, the jury charge authorized a conviction for felony murder if the jurors found that Fraser acted recklessly or with criminal negligence. (CR96, 98-99)

And then, in closing argument, the prosecutor told the jury that they could convict if they found that she acted recklessly. (8RR22)

Accordingly, the Amarillo Court correctly determined that these errors required reversal.

B. Fraser briefly addresses the State’s other contentions.

In addition to discussing why the statutory elements for injury to a child and child endangerment are not includable within the statutory elements for manslaughter, the State addresses other legal concepts that it

contends the Amarillo Court placed some reliance on. Although Fraser argues that the issue before the Court is resolved by the above discussion of the functional-equivalence concept, she will briefly address these other concepts. Specifically, the State also argues that: (1) felony-murder has no culpable mental state; (2) the merger doctrine does not bar Fraser's conviction; and (3) moral and conceptual equivalence among the various mental states are not required. Fraser responds as follows.

1. The required culpable mental state for felony murder is defined by the underlying felony.

The felony-murder statute does plainly dispense with a culpable mental state as to the "act of murder." *Lomax v. State*, 233 S.W.3d 302, 307 (Tex. Crim. App. 2007); see TEX. PEN. CODE § 6.02(b). But it does not dispense with a culpable mental state as to the underlying felony.

For over 40 years, this Court has observed that the required culpable mental state for felony murder is supplied by the underlying felony. *E.g.*, *Ex parte Easter*, 615 S.W.2d 719, 721 (Tex. Crim. App. 1981); *Rodriguez v. State*, 548 S.W.2d 26, 28-29 (Tex. Crim. App. 1977); *Hilliard v. State*, 513 S.W.2d 28, 33 (Tex. Crim. App. 1974). This is nothing more than a specific

application of the principle of transferred intent. *See Richard v. State*, 426 S.W.2d 951, 954-55 (Tex. Crim. App. 1968) (op. on reh'g).

But this Court confronted a new wrinkle in *Lomax* when asked to decide whether felony DWI may serve as the basis for a felony-murder charge because DWI does not have a culpable mental state.

The Court re-affirmed the settled principle that the statute defining the underlying felony “determines whether the underlying felony requires a culpable mental state.” *Lomax*, 233 S.W.3d at 307. Because section 49.11 of the Penal Code plainly dispenses with a culpable mental state for DWI,⁷ then a felony murder prosecution premised on felony DWI likewise requires no culpable mental state. *Id.*

Regardless, *Lomax* reaffirmed that, if the underlying felony proscribes a certain culpable mental state, then the State must prove that culpable mental state to obtain a conviction for felony murder.

2. The merger doctrine does bar Fraser’s conviction.

This Court held in *Johnson* that the merger doctrine does continue to exist for felony murder but only to the extent consistent with section

⁷ Section 49.11(a) provides in relevant part that “proof of a culpable mental state is not required for conviction of an offense under this chapter.” TEX. PEN. CODE § 49.11(a).

19.02(b)(3). Thus, “a conviction for felony murder under section 19.02(b)(3), will not lie when the underlying felony is manslaughter or a lesser included offense of manslaughter.” *Johnson*, 4 S.W.3d at 258.

Fraser has already demonstrated that reckless and criminally negligent injury to a child and child endangerment are lesser-included offenses of manslaughter under the indictment in this case. Therefore, under the merger doctrine as explained in *Johnson*, Fraser’s felony-murder prosecution “will not lie” for reckless or criminally negligent injury to a child or child endangerment.

3. Moral and conceptual equivalence are irrelevant.

This Court has held that due process does not require moral and conceptual equivalence between or among the various underlying felonies in a felony murder prosecution. *Contreras*, 312 S.W.3d at 584-85. The State suggests that the Amarillo Court nonetheless applied a moral and conceptual equivalence to reach the result it did.

But the Amarillo Court did not address this concept. Rather, that court observed that the moral blameworthiness sufficient to justify a felony murder conviction is supplied by the underlying felony but this felony

cannot be manslaughter or a lesser-included offense of manslaughter.⁸ See *Fraser*, 523 S.W.3d at 329. This is merely a restatement of the settled principle that the underlying felony determines the applicable culpable mental state, see *Lomax*, 233 S.W.3d at 307, and a reminder that manslaughter or a lesser-included offense of manslaughter cannot serve as the underlying felony. See *Johnson*, 4 S.W.3d at 258.

For these reasons, Fraser asks the Court to affirm the judgment of the Court of Appeals. See TEX. R. APP. P. 78.1(a); *Burch v. State*, 401 S.W.3d 634, 640 (Tex. Crim. App. 2013).

⁸ The Court thus concluded that a felony murder prosecution should not be premised on “an act that causes the death of an individual by reckless or criminally negligent conduct.” *Fraser v. State*, 523 S.W.3d 320, 329 (Tex. App.—Amarillo 2017, pet. granted).

Prayer

WHEREFORE, PREMISES CONSIDERED, Respondent Marian Fraser asks the Court to: (1) affirm the judgment of the court of appeals; and (2) grant such other and further relief to which she may show herself justly entitled.

Respectfully submitted,

/s/ Alan Bennett

E. Alan Bennett

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Certificate of Compliance

The undersigned hereby certifies, pursuant to Rule of Appellate Procedure 9.4(i)(3), that this computer-generated document contains 5,377 words.

/s/ Alan Bennett
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Certificate of Service

The undersigned hereby certifies that a true and correct copy of this brief was served electronically on January 16, 2018 to: (1) counsel for the State, Debra Windsor, CCAappellatealerts@tarrantcountytexas.gov; and (2) the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Alan Bennett
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